

## ***Prosecutor Checklist: Avoiding Prosecutorial Misconduct***

### **CHARGING**

- ☐ **I did not alter my charges in retaliation of defendant exercising his legal rights or because of a like/dislike for defense counsel.**  
Due process prohibits us from punishing a defendant by filing additional charges in retaliation for his exercising any of his legal rights-such as hiring private counsel, filing discovery requests, demanding interviews, etc.

### **PLEA NEGOTIATIONS**

- ☐ **I asked the victims if they will submit to defense's interviews.**  
While victims have the right to refuse defense interviews, the prosecutor must ask them whether they will submit to a defense interview anyway.
- ☐ **I made all decisions relating to the plea negotiations.**  
A victim has the right to confer with the prosecutor before plea is entered, but the victim does not make the plea decisions.
- ☐ **I made a record of what offers were made to the defendant and whether or not he/she accepted or rejected them.**  
In *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), the Court held that when defense counsel failed to explain a plea offer properly to the defendant. Therefore, the defendant couldn't make a reasoned decision whether to accept the offer or not, and went to trial and lost. The court could require the State to re-extend the original plea offer.

### **DISCOVERY**

- ☐ **I have disclosed all exculpatory evidence (favorable to defendant) to the defense.**  
Under *Brady v. Maryland*, 373 U.S. 83 (1963), due process requires disclosure of evidence favorable to accuse, regardless of good faith or bad faith of prosecutor.
- ☐ **I have disclosed all inculpatory evidence (unfavorable to defendant) to the defense.**  
Rule 15 of the Rules of Criminal Procedure requires us to disclose inculpatory *and* exculpatory evidence.

### **PRETRIAL**

- ☐ **I have made my role as a prosecutor clear to all parties concerned.**
- ☐ **I strictly instructed my officer witnesses not to mention the defendants post-arrest or post-Miranda silence.**
- ☐ **I have not filed any frivolous motions.**  
Ethical Rule 3.1 forbids us from filing frivolous motions (those not supported by existing law or by a good faith argument for changing existing law).
- ☐ **I have not surreptitiously recorded any witness interviews (all parties must be made aware of taping).**

### **TRIAL**

- ☐ **I have not presented any false or misleading testimony.**
- ☐ **I have not placed the prestige of the government behind my witness.**  
Ex-"I promise you that I'm going to tell you the truth."
- ☐ **I have not referred to information not presented to the jury.**  
Ex-"There are some things that I can't tell you, but that witness is lying."
- ☐ **I have not inappropriately commented on defendant's character.**  
Ex-"The defendant is a 'monster, filth, and the reincarnation of the devil.'"
- ☐ **I have not commented on defendant's post-arrest, post-Miranda silence, or defendant's refusal to testify.**  
Ex-"Defendant had an answer for everything, but when the cops asked him a question he didn't like, he stopped talking and asked for a lawyer."
- ☐ **I have not asserted my personal opinion regarding any witnesses, evidence, or testimony given at trial.**  
Ex-"I *think* he was an honest man, but I *think* he made an honest mistake."
- ☐ **I have not suggested other acts of the defendant, or defense misconduct, without proof.**  
Ex-"The doctor knows the result he's looking for, and that's it. Subject comes in with schizophrenic-potential schizophrenic diagnosis, and \$950 later, yes, that's what he got."
- ☐ **I have not appealed to the "passion or prejudice" of the jury.**  
Ex-"When Mr. Henry was testifying, did the word psychopath ever come to mind?"
- ☐ **I have not denigrated the defense attorney or defendant.**  
Ex-"There are two liars in this case-defense counsel and the defendant."
- ☐ **I have not forced/tricked defendant into calling my witnesses liars.**  
Ex-Prosecutor asks defendant, "Is there any reason that the officer would come to court and perjure himself and risk fourteen years on the police force?"
- ☐ **I did not call the jury's attention to punishment or other improper matters.**  
Ex-"Ms. Smith deserves peace-to know for certain that the defendant is locked up for life-never to harm her again."
- ☐ **Even though defense made untimely disclosure, I took the high road and let the evidence in (if not, it could be seen as overzealous advocacy).**
- ☐ **I did not suggest that the jurors needed a "reason" to acquit.**  
Ex-"The State submits to you that if you find the Defendant not guilty, you need to have a reason in order to find reasonable doubt."
- ☐ **I did not purposely say or do anything that deprives the defendant of a fair trial.**